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Submission by the Canadian Environmental Law Association to the Select Committee on Ontario in Confederation

"ENVIRONMENTAL PROTECTION IN A NEW CONSTITUTION"

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group committed to the enforcement and improvement of environmental law.

CELA welcomes this opportunity to present our views on environmental protection in a "new Canada" to the Select Committee on Ontario in Confederation. We have always been interested in constitutional reform in the environmental area. In 1978, CELA presented a brief to the Joint Senate/House of Commons Committee on the Constitution of Canada in relation to Bill C-60 in which a number of recommendations for clarifying the division of powers between the federal and provincial governments and amending the proposed Charter of Rights and Freedoms to enhance environmental protection were set out.[1]

We believe that any discussion about the constitutional arrangements for a "new Canada" must include both a constitutional guarantee of a right to a healthful environment as well as a clearer definition of the shared responsibilities that both the federal and provincial governments have in relation to environmental matters. We believe that Ontario should take a leadership role in ensuring that environmental protection for Canadians is on the constitutional negotiating table. This, of course, does not mean abdication of environmental responsibility by either level of government.

Environmental concerns have been at or near the top of the public agenda during the past few years and we face serious environmental challenges at the local, provincial, national and international levels in the years ahead. The threats of global warming, acid rain, and toxic chemicals are well known and must still be tackled. Protection

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[1] Toby Vigod and John Swaigen, Brief to the Joint Senate/House of Commons Committee on the Constitution of Canada Bill - C-60 (Toronto: CELA, Sept. 29, 1978).

of our environment must be a concern of any new constitution in Canada and should be reflected in its provisions.

Our submissions will comment briefly on the questions raised by the public discussion paper "Changing for the Better" in regard to shared values before turning to a discussion of a constitutional right to a healthful environment. We will explore the rationale for constitutional recognition of environmental rights, suggest amendments to the Canadian Charter of Rights and Freedoms, and discuss the potential for enshrining such rights in the Constitution of Ontario. Finally, we will set out CELA's general views on clarification of the constitutional division of powers in relation to environmental protection and resource conservation.

II. SHARED VALUES

A common value glaringly omitted by the Select Committee's discussion paper is the love that we have for the land that we inhabit and our environment.[2] Our national identity is inextricably tied to this country's landscape with its vast spaces dotted with cities, thousands of lakes, rugged mountains, wildlife and forests. Yet within our lifetime Canadians have witnessed the deterioration of our environment and have increasingly become concerned about its preservation. We maintain that this link with the environment is one that is shared by Canadians right across this country and is a unifying factor.

III. A CONSTITUTIONAL RIGHT TO A HEALTHFUL ENVIRONMENT

CELA urges the Ontario government to put forward in its recommendations to the

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[2] Select Committee on Ontario in Confederation, Changing for the Better, (Toronto: January 1991) at 7.

federal Government that the Charter of Rights and Freedoms be amended to include a right to a healthful environment. We have deliberately chosen the word "healthful" rather than "clean", "healthy", or "pure". For example, in the development of the Illinois Constitution which contains a right to a "healthful" environment, there was considerable discussion of which adjective to use to modify environment. The General Government Committee of the Sixth Illinois Constitutional Convention rejected the words pleasant, aesthetic, pure and clean as incapable of judicial application,and approved healthful because it was capable of proof and subject to change as medical science further determines what does and does not affect health.[3]

The arguments for the constitutional recognition of environmental rights have been canvassed by many commentators over the years.[4] Constitutional recognition of environmental rights would serve a number of functions. First, it would be a clear step toward mandating and requiring the full integration of due consideration of environmental quality into all public and private sector decision-making.

Second, in contrast to ordinary statutory guarantees, such rights could not be easily repealed by subsequent legislatures or overridden without the serious political consequences which accompany disregard for fundamental rights.

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[3] See Leahy, "Individual Legal Remedies Against Pollution in Illinois" (1972), 3 Loy. U. Chi. L.J. 1 at 4. Commentary to Article XI, s.1 of the Illinois Constitution of 1970 states that "The Committee selects the word 'healthful' as best describing the kind of environment which ought to obtain. Healthful is chosen rather than 'clean', 'free of dirt, noise, noxious and toxic materials' and other suggested adjectives because 'healthful' describes the environment in terms of its direct effect on human life while the other suggestions describe the environment more in terms of its physical characteristics. A description in terms of physical characteristics may not be flexible enough to apply to new kinds of pollutants which may be discovered in the future." Ill. Ann. Stat. art XI, s. 1 at constitutional commentary (Smith-Hurd 1971). Healthful may also be a better term to use than "pure" or "clean" as these terms are more susceptible of interpretation as absolute.

[4] Swaigen and Woods, "A Substantive Right to Environmental Quality" being Ch. 4 (pp. 195 - 241) of Swaigen, ed., Environmental Rights in Canada (Toronto: Butterworths, 1981); Bélanger, La reconnaissance d'un droit fondamental à un environnement de qualité (L.L.M. Université de Montréal, 1990) (Montréal: Les Editions Thémis, 1990); Saxe, Environmental Offences: Corporate Responsibility and Executive Responsibility (Aurora: Canada Law Book Inc., 1990) at 5 - 20. Muldoon, "The Fight for an Environmental Bill of Rights", (1985) 15 Alternatives, no. 2 at 33 - 39.

Third, constitutional protection would have an educational function. Public and private sector actors are more likely to take all environmental norms and questions more seriously if a healthful environment is recognized as a fundamental value.

Finally, constitutional recognition of a right to a healthful environment would bring Canada into conformity with the growing recognition in international instruments, including several to which Canada is a party, of the emerging right to environmental quality.[5]

It may be objected that constitutional recognition of a right to a healthful environment will lead to a flood of litigation and usurp the function of the legislatures in making value-laden policy decisions. Experience with environmental rights in other jurisdictions reveals that there is little danger of a flood of frivolous lawsuits.[6] Furthermore, by clearly imposing a first order duty on governments to protect and uphold environmental quality and by allowing for both judicial balancing and legislative override, our proposal amply safeguards the supremacy of the legislature and responsible government. The proposal simply establishes a strong bias in favour of a healthful environment which may be overcome where appropriate. The population of Canada and Ontario is simply given another tool in what is an

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[5] See for example: (Stockholm) Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Principle 1, reprinted in UNEP, In Defence of Earth; The Basic Texts on Environment (Nairobi: UNEP, 1981); Universal Declaration of Human Rights, December 10, 1948, G.A. Res. 217 A (III), Articles 3 and 25 (right to life and standard of living adequate for health and well-being); International Covenant on Civil and Political Rights (1976), [1976] C.T.S. 47, Article 6 (right to life); and, International Covenant on Economic, Social and Cultural Rights (1976), [1976] C.T.S. 46, Articles 7 and 12 (safe and healthy work conditions and right to physical and mental health notably through improved environmental hygiene) (all but the first-mentioned of these instruments are conveniently collected in Schabas, International Human Rights Law and the Canadian Charter (Toronto: Carswell, 1991). For general discussion see: Gertler, Muldoon and Valiante, "Public Access to Environmental Justice" in Canadian Bar Association Committee Report, Sustainable Development in Canada; Options for Law Reform (Ottawa: CBA, 1990) at 79 - 84 and references therein.

[6] Swaigen, supra note 4, and Bryden, "Environmental Rights in Theory and Practice" (1978), 62 Minn. L. Rev. 163.

ongoing dialogue about environmental protection.

The idea of a constitutional right to a healthful environment is not a new one either in Canada or world-wide. Such a right is recognized either expressly or impliedly in the constitutions of more than twenty countries including several western democracies, the European socialist countries, China, and a number of developing countries.[7] As well, the right to a clean environment has been recognized in a number of U.S. states constitutions. (See Appendix A for a list of countries and states and the sections from their constitutions that provide for a right to environmental quality). According to one author, Canada may be the only country to have adopted or amended a constitution since 1975 which did not include a recognition of a right to a clean environment.[8]

In Canada, environmental groups, and many commentators have put forward the idea of constitutional recognition of a right to a healthful environment. Canada has also embraced the report of the Brundtland Commission entitled Our Common Future which urges governments to take steps to reformulate their legislation in order to, inter alia, recognize the rights and responsibilities of citizens and states regarding sustainable development. In particular, the Report states that governments must recognize not only their responsibility in ensuring a viable environment for present and future generations, but they must also recognize certain other environmental rights enjoyed by citizens:

> ... progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have

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[7] Saxe, supra note 4.

[8] Ibid. citing New Human Rights, a discussion paper prepared by A.H. Robertson and A.C. Kiss at 5.

> a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.[9]

The Final Report on Legal Principles for Environmental Protection and Sustainable Development written by an Experts Group on Environmental Law for the Brundtland Commission, recommends a set of general principles concerning natural resources and environmental interferences. Article 1 would provide that "all human beings have the fundamental right to an environment adequate for their health and well-being."[10]

CELA believes that the recognition of a right to a healthful environment will add weight to environmental considerations and ensure a degree of protection not currently afforded from legislative and administrative interference.

Due to the fact that the Canadian Charter of Rights and Freedoms only applies to governmental activity and not to private sector action which may threaten the environment, commentators have recommended that an amended Constitution impose on federal and provincial legislatures and governments an obligation to enact and enforce effective measures applicable to the private sector. To ensure that this duty is carried out, the Constitution would have to provide for judicial review of this obligation.

It is important that a constitutional guarantee of environmental protection be more than an empty declaration. Professor Dale Gibson has recently set out a draft of some language that could be inserted into the Canadian Charter of Rights and

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[9] World Commission on Environment and Development, Our Common Future (Oxford: WCED, 1987) at 330.

[10] World Commission on Environment and Development, Experts Group on Environmental Law, Environmental Protection and Sustainable Development: Legal Principles and Recommendations (London: Graham & Trotman/Martinus Nijhoff, 1987) at 38 - 42.

Freedoms (see Appendix B).[11] We believe that Professor Gibson's suggested language is worthy of consideration and that it provides a good basis for the development of appropriate amendments to the Charter to enshrine environmental rights.

IV. THE CONSTITUTION OF ONTARIO AS A VEHICLE FOR PROTECTION OF RIGHT TO A HEALTHFUL ENVIRONMENT

CELA also recommends that a substantive right to a healthful environment be enshrined in Ontario's constitution. The following discussion will describe and define the Constitution of Ontario, review the procedure for amendments thereto, and discuss the legal efficacy of a substantive constitutional right to a healthful environment in Ontario.

A. The Constitution of Ontario

1. Definition and Content

That Ontario has a constitution which is in some measure distinct from the Constitution of Canada may come as a surprise to many. The discussion which follows is necessarily brief and only permits superficial treatment of an important and complex aspect of our constitutional law.

Despite the Constitution Act, 1982, constitutional law in Canada is still found in disparate sources. These range from the most well-known provisions of the Constitution Act, 1867 (e.g. ss. 91 and 92) and the Canadian Charter of Rights and Freedoms, to various pre- and post-Confederation Imperial, federal and provincial

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[11] Dale Gibson, "Constitutional Entrenchment of Environmental Rights" in Nicole Duple ed. Le droit a la qualité de l'environnement: un droit en devenir un droit a definir (Montreal: Editions Quebec/Amerique, 1988).

statutes, orders-in-council and other instruments, and certain common law rules, prerogative powers and conventions.[12] The same situation prevails with respect to the Constitution of Ontario.[13]

The existence of a provincial Constitution is confirmed in Part V (ss. 58-90) of the Constitution Act, 1867 which carries the title "Provincial Constitutions." After describing the executive power as formally vested in the Lieutenant Governor, s.69 - 70 establish the Legislative Assembly of Ontario and constitute it as the legislature for Ontario.

A further trace of the provincial constitution is found in Part V (ss.38-49) of the Constitution Act, 1982 entitled "Procedure for Amending Constitution of Canada." Prior to 1982, ss.92(1) of the Constitution Act, 1867 gave each province the exclusive power to amend its constitution in the following terms:

> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the Office of Lieutenant Governor.

Now s.45 of the Constitution Act, 1982 makes similar provision for constitutional amendment:

> 45. Subject to section 41 [unanimous consent for certain amendments not relevant here], the legislature of each province may exclusively make laws amending the constitution of the province.[14]

If the Constitution of Ontario exists and may generally be amended by ordinary

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[12] See general discussion in Hogg, Constitutional Law of Canada (2nd ed., 1985) at 1 - 20.

[13] OPSEU v. Ontario (Attorney General), [1987] 2. S.C.R. 2 at 37 - 39.

[14] We submit that s. 43 respecting certain kinds of amendments which require approval of the Ontario Legislature and Parliament is not relevant here.

legislation, further questions arise. What is contained in the Constitution of Ontario and what is the value of adopting a substantive right to a healthful environment as a constitutional amendment?

Placed in historical and legal context, the current content of the Constitution of Ontario has been defined in positive terms to most clearly embrace enactments which are inherently constitutional in nature and which bear on the operation of an organ of the government of the province. Examples include provisions relating to the composition, powers, authority, privileges and duties of the legislative or executive branches or their members.[15]

The most obvious statute in the Ontario context is the Legislative Assembly Act (R.S.O. 1980, c. 235). Certain elements of the substantive environmental right we propose as set out below are clearly of an organic or procedural nature and fit easily into this category of laws (e.g. provision in certain cases for a 2/3 majority to replace the usual requirement of a simple majority as set out in s.55 of that Act). Other aspects of the right we propose are of a more substantive nature, and are less obviously identifiable as amendments to the Constitution of Ontario (e.g. provisions granting a positive substantive right to a healthful environment or controlling the applicability of legislation on the basis of inconsistency with that right).

Whether such substantive constitutional provisions may be seen as part of the "Constitution of Ontario" and therefore within the power of the Ontario legislature to adopt unilaterally, depends on the negative or outer limits of that expression. The most important limit is that the amendments we propose may not bear on legal powers and arrangements which are "... otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or

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[15] OPSEU v. Ontario (Attorney General), supra, note 13 at 38 - 39.

condition of the union..."[16]

Most specifically, an amendment may not disturb the division of powers as set out in s.91-95 of the Constitution Act, 1867. However, there is no constitutional objection to an amendment to the constitution of a province which limits the manner and form in which the Legislative Assembly of Ontario will exercise its powers as conferred under the division of powers.

Although we are not aware of any explicit constitutionalization in Canada of express environmental rights, the device has been used in related contexts. For example, the Canadian Bill of Rights (S.C. 1960, s.44) and the provincial charters of rights such as the Quebec Charter of Human Rights and Freedoms (R.S.Q., c. C-12) have the effect of protecting fundamental rights and controlling the substantive content of legislation and have been described as being "constitutional or quasi-constitutional instruments."[17]

In a slightly different and highly pertinent context, the Constitution of Alberta Amendment Act, 1990 (S.A. 1990, c. C-22.2) (reproduced here as Appendix C) provides constitutional protection for lands under the Metis Settlements Land Protection Act (S.A. 1990, c. M-14.8) and adds Metis consent as an obligatory manner and form restriction on any legislation amending or repealing the relevant rights and constitutional legislation. This amendment to the Constitution of Alberta is explicitly an interim measure pending fully entrenched protection of Metis settlement lands in the Constitution of Canada (see s.8).

2. Mechanism and Form of Constitutional Amendment

Under s.45 of the Constitution Act, 1982 (as before) an amendment to the

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[16] Ibid., at 40.

[17] Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 176 at 224.

Constitution of Ontario may be adopted by ordinary legislation. The general (if not the universal) practice has been to simply have constitutional amendments in Ontario stand as ordinary legislation even where the effect is to amend the Constitution Act, 1867 as such (e.g. Executive Council Act (R.S.O. 1980, c.147) amending s. 63 on the composition of the provincial cabinet, Representation Act, 1986 (S.O. 1986, c.30) amending s. 70 on the number of members of the Legislature and the Legislative Assembly Act (R.S.O. 1980, c. 235) amending s. 83 on incompatible offices and s. 85 on the length of a Legislature).

What we propose is that the substantive right to a healthful environment be adopted in ordinary legislation which is actually framed as an amendment to the Constitution Act, 1867 to be inserted therein. This method of proceeding is untested, but it is difficult to see how it can be refused. The text of the Constitution Act, 1867 is now out of the hands of the Parliament at Westminster and in its parts which are included in the Constitution of Ontario belong to Ontario and not to the federal government or the other provinces.[18]

The advantage of an actual insertion into the Constitution Act, 1867 is that the text would then be re-printed and widely distributed with the federal Constitution. This would increase its educational value and exert pressure for constitutional protection of environmental rights at the federal and provincial levels.

3. Constitutional Efficacy of Amendment to the Constitution of Ontario

There are two main issues here. One respecting "manner and form" restrictions and one respecting Charter review of the Constitution of Ontario.

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[18] See commentary in Hogg, supra at 66 - 68 and 69 - 70 respecting the ability of provinces under section 45 - rather than section 43 - of the Constitution Act, 1982 to amend portions of the Constitution Act, 1867 which are parts of a provincial Constitution.

First, full entrenchment, placing the proposed amendment altogether beyond the reach of the Ontario Legislature, is not possible. Therefore, the ability of the Legislative Assembly to bind itself for the future through "manner and form" restrictions must be evaluated. This issue arises both as regards legislation incompatible with the environmental rights to be guaranteed and legislation which purports to repeal or amend the constitutional protection of environmental rights.[19]

Insofar as the proposed constitutional amendments would be in the form of ordinary legislation, questions may be raised as to the efficacy of such provisions in view of the fundamental principle of Parliamentary sovereignty whereby a legislature cannot bind itself for the future as to the substance of legislation to be adopted. (Of course truly entrenched provisions of a written constitution can always have such an effect).

In any case, new constitutional amendments by way of ordinary legislation can clearly control or repeal inconsistent prior legislation.

It is also now reasonably clear that "manner and form" restrictions are valid and effective. Thus (for example) the Legislative Assembly of Ontario could provide that existing legislation and government action inconsistent with the right to a healthful environment is of no force and effect and that subsequent legislation inconsistent with the environmental rights guaranteed in the Constitution of Ontario or repealing any of its parts may only be validly adopted by a two-thirds vote of the legislature and with express provisions that the new legislation applies notwithstanding those

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[19] The third and fourth elements of the right we propose below involve a controlling effect for the amendment to the Constitution of Ontario on prior and subsequent Ontario legislation and government action pursuant to such legislation. Similarly, the first and sixth elements of the right contemplate special majorities for the repeal of environmental rights, the repeal of that provision for special majorities and for the application of a notwithstanding clause.

rights.[20]

In concrete terms, the amendments to the Constitution of Ontario could only be undone by a further exercise of the amending power. That power would be conditioned by the amendments made to the amending process regarding the manner and form of any legislation in derogation of the environmental rights in question.

The second issue is the possibility of a Charter challenge to the validity or applicability of the environmental rights we propose.

Section 52 of the Constitution Act, 1982 gives an overriding and controlling effect to the Constitution of Canada and then provides what appears to be an inclusive (not an exhaustive) definition of the "Constitution of Canada." We would argue that the Constitution of Ontario, (as amended from time to time by the Ontario Legislature) even though it is not specifically referred to as part of the Constitution of Canada, has that status and cannot be attacked on Charter grounds. For example, an affected industrial concern could not claim that the right to a healthy environment is invalid as being in breach of certain Charter rights.[21]

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[20] See: Attorney General for New South Wales v. Trethowan, [1932] A.C. 526 (J.C.P.C. Australia); R. v. Nat. Bell Liquors Ltd., [1922] 2 A.C. 268 (J.C.P.C. Canada); Bribery Commissioner v. Ranasinghe, [1965] A.C. 172 (J.C.P.C. Ceylon): Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 238 - 239 (per Beetz J.); Hogg, supra at 261 - 264 and 640 - 645 and Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Beaudoin and Ratushney, The Canadian Charter of Rights and Freedoms, (2nd ed. Toronto: Carswell, 1989) at 5.

[21] In view of the wording of s. 52 and the disparate sources of the Canadian Constitution (above), it has been argued that even constitutional instruments and rules not listed in the Schedule to the Constitution Act, 1982 referred to in s. 52 thereof are nonetheless part of the "Constitution of Canada." See, Scott, "The Canadian Constitutional Amendment Process" (1982), 45 Law & Contemp. Problems 249 at 254 - 263. This would imply that such instruments and rules would override ordinary legislation and would have to be interpreted together with the other provisions of the Constitution of Canada (including the Charter), rather than be controlled thereby (Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148). On such an interpretation, the amendments to the Constitution of Ontario we propose would be part of the Constitution of Canada with all attendant effects.

The weight of authority would, nonetheless, read s.52 as providing an exhaustive definition of the Constitution of Canada with the result that ordinary legislative amendments such as those we propose to the Constitution of Ontario would be subject to Charter review.[22]

B. Elements of a Constitutional Substantive Right to Environmental Quality

CELA recommends that a constitutional substantive right to a healthful environment have six key elements and characteristics.

First, the right would be part of the Constitution of Ontario, would be binding on the Government of Ontario, municipalities, public and private corporations and individuals within Ontario's legislative jurisdiction, and would be protected by a provision that it could only be repealed by a two-thirds (2/3) majority of all of the members (including those not present) of the Legislative Assembly of Ontario.

Second, a clear but not overly detailed definition of environment which would be both anthropocentric-focusing on human life, health and well-being, and ecocentric-focusing on bio-diversity, ecosystem integrity and sustainability. As the right proposed here is very strong indeed, this must be balanced by a definition of environment which is sufficiently circumscribed to ensure that the right may be practically applicable and enforceable.

Third, all residents of Ontario would have a substantive right to a healthful environment. Such a right would be drafted as to make it clear that it is not merely declaratory of existing rights and protections, but rather imposes a positive first-order

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[22] See notably, Hogg, Constitutional Law of Canada, supra at 6 - 8; Re Dixon and A.G.B.C. (1986), 31 D.L.R. (4th) 546 (B.C.S.C.); MacLean v. A.G.N.S. (1987), 35 D.L.R. (4th) 306 (N.S.S.C.); Dixon v. A.G.B.C. (1989), 59 D.L.R. (4th) 247 (B.C.S.C.); New Brunswick Broadcasting Co. v. Donahoe (1990), 71 D.L.R. (4th) 23 (N.S.S.C.); and, Carter v. Saskatchewan (Attorney General), 6 June 1991, Supreme Court of Canada, No. 22345.

constitutional duty (absent the need for but not excluding judicial review) on all those persons and organizations mentioned in the first point above.[23] All such actors would be obliged to legislate, administer public and private property and act in all matters in strict accord with the substantive right to a healthful environment.

Fourth, the right would have the effect of imposing a "manner and form" limit on the exercise by the Legislative Assembly of Ontario (and all those bodies deriving authority from the legislature) of the jurisdiction granted to Ontario by s.92, 92A, 93 and 95 of the Constitution Act, 1867. Any legislation inconsistent with the right, prior to or subsequent to the constitutionalization of a right to a healthful environment, would be expressly made of no force or effect to the extent of the inconsistency.[24]

Fifth, provision would be made for appropriate remedies (including injunctions against the Crown) for individuals and incorporated and unincorporated public interest groups where the substantive right to environmental quality is breached or abridged by legislation or government or private action or inaction. Care would have to be taken to overcome unjustifiable limits on standing or the availability of remedies. Such a remedial provision could be broadly similar to s. 24 of the Charter, but might be extended to allow appropriate relief from the inferior tribunals so often charged with land and resource use and environmental matters.

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[23] See Slattery, "A Theory of the Charter" (1987) 25 Osgoode Hall L.J. 701, respecting positive constitutional duties.

[24] In accord with the supremacy of the legislature and the first-order nature of duties to protect constitutional rights, this provision for the control of the substance of previous and subsequent legislation could be accompanied by a provision for review of previous legislation and scrutiny of future statues, regulations and by-laws by the Ministry of Environment in order to verify whether they are consistent with the right without waiting for the issue to arise in legal proceedings. This would be similar to s.3 of the Canadian Bill of Rights (S.C. 1960, c.44) and to the exercise carried out by the Government of Canada between the proclamation of the Constitution Act, 1982 on April 17, 1982 and the coming into force of s.15 (equality rights) of the Charter on April 17, 1985 pursuant to ss.32(2) thereof.

Finally, the right would be subject to a strictly limited notwithstanding clause allowing for legislative override. Such a provision may be necessary to allow for the validity of certain specific and circumscribed legislation or government action which might otherwise breach the right to a healthful environment. The notwithstanding clause would be an effective override for a renewable period of five years and could only be activated by a two-thirds (2/3) majority of all of the members (including those not present) of the Legislative Assembly of Ontario.[25]

V. DIVISION OF POWERS - THE ROLE OF THE FEDERAL AND PROVINCIAL GOVERNMENTS IN RELATION TO ENVIRONMENTAL PROTECTION

Unfortunately, the Constitution Act, 1867, which reflected the problems and concerns of 1867 when it was enacted, did not allocate legislative authority for the environment to either the federal or the provincial governments. As a result, there is a large degree of overlapping jurisdiction because of the generality of the federal and provincial powers as defined in the Constitution.

The constitutional division of powers has created many problems in the environmental field. Deciding whether a matter of environmental concern is of provincial, federal or shared jurisdiction is often very difficult. Without clear responsibility for environmental concerns, both levels of government have engaged in a lot of "jurisdictional buckpassing." Constitutional questions frequently arise in relation to the question of which level of government will deal with the emerging concerns of the late 20th century (eg. biotechnology or the clean up of hazardous waste sites).

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[25] Provision could also be explicitly made for judicial balancing of environmental quality against other interests or values in a provision similar to s.1 of the Canadian Charter of Rights and Freedoms.

Constitutional issues are also raised by polluters when faced with environmental charges under either provincial or federal environmental legislation. The Crown Zellerbach case which took 8 years to wend its way up to the Supreme Court of Canada, involved a constitutional challenge to the provisions of the Ocean Dumping Control Act.[26] There have been other challenges over the years to the federal Clean Air Act and Ontario's Environmental Protection Act. Most recently, in February 1991 the Supreme Court of Canada heard challenges by Alberta and six other provinces to the constitutionality of the federal Environmental Assessment Review Process (EARP) Guidelines Order in relation to the Oldman River Dam case.[27]

It would therefore seem that it would be important to attempt to clarify the situation with respect to the constitutional division of powers in regard to environmental protection. A number of commentators have grappled with this complex issue in the past.[28]

While CELA has always taken the position that there is a role for all levels of government in protection of the environment, we have argued, as have many

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[26] R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

[27] The Queen in right of Alberta v. Friends of the Oldman River Society, S.C.C. No. 21890. CELA and a number of other environmental and aboriginal organizations across the country intervened on the side of the Friends of the Oldman River Society, the Alberta environmental group in court upholding the constitutionality of the EARP Guidelines Order and its applicability to the Oldman Dam. The Supreme Court has reserved its decision on this important case.

[28] Gibson, "Environmental Protection and Enhancement under a New Canadian Constitution," in Beck and Bernier, eds., Canada and the New Constitution (Montreal: The Institute for Research on Public Policy, 1983); Mains, "Some Environmental Aspects of a Canadian Constitution", (1980) 9 Alternatives 14; Andrews, "The Public Interest Perspective" in Donna Tingley, ed., Environmental Protection and the Canadian Constitution, Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment (Edmonton: Environmental Law Centre, 1987); Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government," in Into the Future: Environmental Law and Policy for the 1990s (Edmonton: Environmental Law Centre, 1989); Emond, "The Case for a Greater Federal Role in the Environmental Protection Field", (1972), 10 Osgoode Hall Law Journal 647; and Vigod and Swaigen, supra note 1.

commentators, for a greater federal role in environmental protection. We know, for example, that air and water pollution do not respect provincial boundaries and that there are many circumstances where the actions of just one province may not be sufficient in dealing with an environmental problem. Further, there is a need for national standards and a centralized authority to ensure that "pollution havens" are not created. Protection of the environment cannot and should not rest solely with the owner of our natural resources. Provincial governments cannot deal with transboundary and national aspects of the degradation of the environment. CELA therefore does not support the recommendations of the recent Report of the Constitutional Committee of the Quebec Liberal Party (Allaire report) that "environment" be an area of exclusive Quebec authority.[29]

The present constitution does allow for a certain amount of overlap in respect to environmental matters. The only concurrency formally recognized by the Constitution Act, 1867 is in relation to agriculture, immigration, old age pensions and export from a province to another part of Canada of production from non-renewable and forestry resources, as well as of electrical power. Nonetheless, "functional concurrency" may result where a single subject matter of legislation has both federal and provincial aspects. This has occurred to some degree in the environmental field, where for example, water pollution has been regulated in Ontario under the Ontario Water Resources Act (no impairment of water quality) and federally under the Fisheries Act (no destruction of fish habitat or deposit of material deleterious to fish). General constitutional rules provide that if there is a direct conflict between the provisions of federal and provincial legislation, the federal provision is paramount and renders inoperative the provincial provision, to the extent of the inconsistency or conflict.

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[29] Constitutional Committee of the Quebec Liberal Party, A Quebec Free to Choose (January 28, 1991) at 37 - 38.

However, the Supreme Court in the Interprovincial Cooperatives[30] case refused to endorse a functional concurrency approach in respect of the authority of the Province of Manitoba to pass a law dealing with pollution of Manitoba waters by extra-provincial sources. A majority of the court held that the enactment was invalid, even though there was no contradictory federal legislation in place. This case had the unfortunate result in creating a gap in the environmental protection regime.

CELA maintains that in designing a new constitution for Canada, this type of situation should be rectified and that concurrency with federal paramountcy should be recognized. We recommend that the following provision be added to the Constitution:

> The Parliament of Canada and the Provincial legislatures may make laws in relation to environmental protection and resource conservation. In the event of any conflict, the legislation of the federal Parliament shall prevail to the extent of the conflict.

The other lacuna that has developed over time is the general immunity from provincial legislation that the courts have accorded to the federal government, federal Crown corporations, agencies and enterprises. For example, in 1981 the provincial government laid charges under the Ontario Water Resources Act against Eldorado Nuclear Limited for a spill of raffinate into Lake Ontario. The charges were ultimately thrown out as the court found that Eldorado, a federal Crown corporation, was immune from the application of provincial environmental law as the legislation did not expressly or by necessary implication bind the federal Crown.[31] A similar situation arose in 1987 when the National Research Council (NRC) was charged under the Ontario Environmental Protection Act with illegal transfer of waste to an unauthorized waste hauler without completion of any waste manifests as required by the regulations. The Provincial Court held that the Ontario legislation did not bind the federal Crown and the

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[30] Interprovincial Cooperatives Ltd. v. The Queen, [1976] 1 S.C.R. 477.

[31] Re Eldorado Nuclear Ltd. (1980), 9 C.E.L.R. 142 (Ont. Prov. Ct.).

charges were dismissed.

CELA recommends that the Constitution be amended to provide that the federal government, federal agencies and enterprises are subject to provincial and municipal laws except to the extent that they are specifically granted immunity by federal legislation.[32]

VI. CONCLUSIONS

One of the common values that Canadians share is a love for the land we inhabit and our environment. We have seen public awareness and concern for environmental protection grow during the past decade. There is a general recognition that a clean environment is a prerequisite to a healthy economy and that we must ensure that the environment is protected for future generations. The enshrining of a right to a healthful environment and other attendant rights and obligations would therefore seem to be timely in any discussion of a "new constitution" for Canada. We believe that Ontario should take a leadership role in ensuring that environmental protection is on the constitutional negotiating table. We would also contend that Ontario can take an important and creative step in amending its own Constitution to enshrine a right to a healthful environment.

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[32] For a discussion of this point see Gibson, "The Environment and the Constitution: New Wine in Old Bottles" in Dwivedi, ed., Protecting the Environment (Toronto: Copp Clark Publishing, 1974).

APPENDIX A

ENVIRONMENTAL CLAUSES IN CONSTITUTIONS

A. Foreign Constitutions

1. Bulgaria, 1971, Art. 31

> The state bodies and enterprises, the cooperatives and public organizations, as well as every citizen, are duty-bound to protect and preserve nature and natural resources, the water, air and soil, as well as the cultural monuments.[1]

2. Chile, 1980, Art. 19 sec.(8)

> The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature.
>
> The law may establish specific restriction on the exercise of certain rights or freedoms in order to protect the environment.[2]

3. China, 1982, Art. 9

> The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.[3]

4. German Democratic Republic (GDR), 1974, Art. 15

> 1. The soil of the GDR is one of its most valuable natural riches. It must be protected and utilized rationally. Forest and cultivated land may be withdrawn from such use only with the agreement of the responsible state organs.
>
> 2. In the interests of the well-being of citizens, the state and society care for the protection of nature. The competent bodies shall insure the purity of water and the air, and protection for flora and fauna and the natural beauties of the homeland; in addition this is the affair of every

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1 Blaustein Flanz, Constitutions of the Countries of the World, vol. 3.

2 Ibid., Historic Constitutions, vol. 3.

3 Ibid., vol. 4.

citizen.[4]

5. Greece, 1975, Art. 24

> 1. The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment...[5]

6. India, 1989, Sec. 48A, 51A(g)

> 48A The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
>
> 51A(g) It shall be the duty of every citizen of India...to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.[6]

7. Mexico, 1987, Art. 27

> ...The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them to ensure a more equitable distribution of public wealth, to attain a well-balanced development of the country and improvement of the living conditions of the rural and urban population. With this end in view, necessary measures shall be taken to put order to human settlements and establish adequate lands, waters and forests provisions, uses, reserves and purposes, so as to carry out public works and to plan and regulate the foundation, conservation, betterment and growth of the centers of population; to preserve and restore the ecological balance; ...and to prevent the destruction of natural resources and to protect property from damage to the detriment of society.[7]

8. Mozambique, 1980, Art. 11

> The state shall promote knowledge, surveys and evaluation of

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4 Ibid., vol. 4.

5 Ibid., vol. 6.

6 Ibid., vol. 7.

7 Ibid., vol. 10.

natural resources, guaranteeing the ecological balance and the conservation and preservation of the environment.[8]

9. Namibia, Art. 95(1), 91(c)

95(1) ...the ecosystems, essential ecological processes and biological diversity of Namibia are maintained and living natural resources are utilized on a sustainable basis for the benefit of all Namibians, both present and futre; in particular the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

91(c) (The Ombudsman has)...the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.[9]

10. Netherlands, 1987, Art. 21

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.[10]

11. Nicaragua, 1987, Art. 102

The natural resources are national patrimony. The preservation of the environment, and the conservation, development and rational exploitation of the natural resources are responsibilities of the state; the state may formalilze contracts for the national exploitation of these resources when required by the national interest.[11]

12. Peru, 1979, Art. 123

Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and

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8 Ibid., vol. 11.

9 "Environmental Law", Centre for Applied Legal Studies, University of Witwatersrand, Oct. 1990, p. 63.

10 Ibid., vol. 11.

11 Ibid., vol. 12.

the preservation of the countryside and nature. Everyone has the duty to conserve said environment.

It is the obligation of the State to prevent and control environmental pollution.[12]

13. Poland, 1952, Art. 71

Citizens of the Polish People's Republic shall have the right to benefit from the natural environment and it shall be their duty to protect it.[13]

14. Portugal, 1982, Art. 66

1. Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.

2. It shall be the duty of the State, acting through appropriate bodies and having recourse to popular initiative to:

   a. Prevent and control pollution and its effects and harmful forms of erosion;
   b. Have regard in regional planning to the creation of balanced biological areas;
   c. Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;
   d. Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

3. Everyone shall have the right, in accordance with the law, to promote the prevention or cessation of factors leading to the deterioration of the environment and, in the case of direct losses, to a corresponding compensation.[14]

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[12] Ibid., vol. 14.

[13] Ibid., vol. 14.

[14] Ibid., vol. 15.

15. Soviet Union, 1977, Art. 18

> In the interests of the present and future generations, the necessary steps are taken in the USSR to protect and make scientific, rational use of the land and its mineral and water resources, and the plant and animal kingdoms, to preserve the purity of air and water, ensure reproduction of natural wealth, and improve the human environment.[15]

16. Spain, 1978, Art. 45

> 1. Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.
>
> 2. The public authorities shall concern themselves with the rational use of natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity.
>
> 3. For those who violate the provisions of the foregoing paragraph penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused.[16]

17. Sri Lanka, 1978, Sec. 27(14)

> The State shall protect, preserve and improve the environment for the benefit of the community.[17]

18. Yugoslavia, 1974, Art. 87

> Working people and citizens, organizations of associated labour, socio-political communities, local communities and other self-managing organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or

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[15] Ibid., vol. 18.

[16] Ibid., vol. 16.

[17] Ibid., vol. 16.

noise pollution and the like, which endanger these values and imperil the health and lives of people.[18]

B. U.S. State Constitutions[19]

19. Massachusetts, amend. Art. 49

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agriculture, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> The general court shall have the power to enact legislation necessary or expedient to protect such rights. In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court.

20. Rhode Island, Art. 37, sec. 1

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this State; and they shall be secure in their rights to use and enjoyment of the natural resources of the State with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of air, land, water, plant, animal, mineral and other natural resources of the State, and to adopt all means necessary and proper by law to protect the natural environment of the people of the State by

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[18] Ibid., supplement.

[19] Other U.S. state constitutions with environmental rights include Alaska Constitution, art. 8; Florida Constitution, art. 2, s.7; Georgia Constitution, art. 3, s.8; Hawaii Constitution, art. 10, s.1; Montana Constitution, art. 9, s.1; New Mexico Constitution, art. 20, s.21; New York Constitution, art. 14, s.4; North Carolina Constitution, art. 14, s.5 and Virgina Constitution, art. 11, s.1.

providing adequate resource planning for the control and regulation of the use of the natural resources of the State and for the preservation, regeneration and restoration of the natural environment of the State.

21. Texas, Art. 16, sec. 59(a)

The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal water, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the legislature shall pass all such laws as may be appropriate thereto.

22. Pennsylvania, Art. 1, sec. 27

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

23. Michigan, Art. 4, sec. 52

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Environmental Rights

15.1 (1) *Right to Beneficial Environment*
Everyone has the right to a beneficial environment, and to enjoy its use for recreational, aesthetic, historical, cultural, scientific and economic purposes, to the extent reasonably consistent with:
(a) the equivalent rights of others;
(b) the health and safety of others; and
(c) the preservation of a beneficial environment in accordance with subsection (2).

(2) Everyone has a right to the preservation of a beneficial environment, so as to ensure its future enjoyment for the uses set out in subsection (1).

(3) For the purposes of this section, "environment" includes land, water, air and space, and the living things that inhabit them, as well as artificial structures and spaces that are beneficial to humans or to other components of the environment.

15.2 (1) *Duty to Make and Enforce Environmental Laws*
The Parliament and Government of Canada, and the Legislatures and Governments of the Provinces have the duty, within their respective areas of jurisdiction, to make and enforce laws and programs for the implementation of the rights set out in section 15.1.

(2) *Content of Laws*
The laws and programs referred to in subsection (1) shall include, without restricting the generality thereof:
(i) the creation and maintenance of an environmental protection agency for each jurisdiction, responsible for determining minimum standards of environmental quality and preservation appropriate for each aspect of the environment, in each area of the jurisdiction, and to vary such standards, partially or wholly, temporarily or permanently, where the agency deems such variation to be advisable;
(ii) the creation of effective measures to enforce such minimum standards within the jurisdiction;
(iii) the right of everyone resident within the jurisdiction to be informed by the environmental protection agency, by means of appropriate public notice, of all pending determinations or variations of such minimum standards and allowing a reasonable time before each determination or variation is decided upon by the agency; and
(iv) the right of everyone resident within the jurisdiction to make representations of fact, law, or policy to the environmental protection agency about any determination or variation of such minimum standards

(3) *Scope*
The laws and programs referred to in subsection (1) shall apply to activities of the Crown, as well as to activities of private persons and organizations.

15.3 *Judicial Review*
After this section and sections 15.1 and 15.2 have been in force for more than one year, everyone has the right, to apply under subsection 24(1) to a court of competent jurisdiction for a declaration that the Parliament or the Government of Canada, or the Legislature or Government of a province, has failed to fulfil some or all of the duties imposed by section 15.2.

APPENDIX C

Bill 36

CONSTITUTION OF ALBERTA AMENDMENT ACT, 1990

CHAPTER C-22.2

(Assented to July 5, 1990)

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WHEREAS the Metis were present when the Province of Alberta was established and they and the land set aside for their use form a unique part of the history and culture of the Province; and

WHEREAS it is desired that the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta and, to that end, Her Majesty in right of Alberta is granting title to land to the Metis Settlements General Council; and

WHEREAS Her Majesty in right of Alberta has proposed the land so granted be protected by the Constitution of Canada, but until that happens it is proper that the land be protected by the constitution of the Province; and

WHEREAS section 45 of the *Constitution Act, 1982* empowers the legislature of a province, subject to section 41 of that Act, to amend the constitution of the province; and

WHEREAS nothing in this Act, the *Metis Settlements Land Protection Act*, the *Metis Settlements Accord Implementation Act* or the *Metis Settlements Act* is to be construed so as to abrogate or derogate from any aboriginal rights referred to in section 35 of the *Constitution Act, 1982*;

NOW THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Constitution amended

1 The constitution of Alberta is amended by this Act.

Definition

2 In this Act, "Metis settlement land" means land held in fee simple by the Metis Settlements General Council under letters patent from Her Majesty in right of Alberta.

Expropriation

3 The fee simple estate in Metis settlement land, or any interest in it less than fee simple, may not be acquired through expropriation by Her Majesty in right of Alberta or any person, but an interest less than fee simple may be acquired in that land in a manner permitted by the *Metis Settlements Land Protection Act*.

Exemption from seizure

4 The fee simple estate in Metis settlement land is exempt from seizure and sale under court order, writ of execution or any other process whether judicial or extra-judicial.

Restriction on Legislative Assembly

5 The Legislative Assembly may not pass any Bill that would

(a) amend or repeal the *Metis Settlements Land Protection Act*,

(b) alter or revoke letters patent granting Metis settlement land to the Metis Settlements General Council, or

(c) dissolve the Metis Settlements General Council or result in its being composed of persons who are not settlement members,

without the agreement of the Metis Settlements General Council.

Application of laws

6 Nothing in this Act shall be construed as limiting

(a) the application of the laws of Alberta to, or

(b) the jurisdiction of the Legislature to enact laws in and for Alberta applicable to,

the Metis settlement land and any activities on or in respect of that land, except to the extent necessary to give effect to this Act.

Power to affect Act

7 A Bill that would amend or repeal this Act may be passed by the Legislative Assembly of Alberta only after a plebiscite of settlement members under the *Election Act* where a majority of the members of each settlement vote in favour of the subject-matter of the Bill.

Repeal

8 Notwithstanding section 7, this Act may be repealed by the Legislature after the Metis settlement land is protected by the Constitution of Canada.

Coming into force

9 *This Act comes into force on Proclamation.*

(NOTE: Proclaimed in force November 1, 1990.)